COA No. 56533-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

ALYSE WAGNER,

Respondent.

THE HONORABLE JAMES J. DIXON

APPELLANT'S OPENING BRIEF

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B. ISSUES AS TO ASSIGNMENT OF ERROR

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2. Do the 2020 amendments to the bail jumping statute apply retroactively to all bail jumping offenses?

C. STATEMENT OF THE CASE

Alyse Wagner was charged with criminal impersonation per RCW 9A.60.050(1)(a) because she gave police a false name to avoid an arrest warrant on November 26, 2019. CP 2-3.

Ms. Wagner was not at a hearing scheduled for January 21, 2020. On February 13, the state added a charge of bail jumping pursuant to former RCW 9A.76.170(3)(c). CP 4.

On that date the Legislature was already considering substantial amendments to the bail jumping statute.

https://app.leg.wa.gov/billsummary?BillNumber=2231&Year=2019&Initiative=false.

Pending trial Ms. Wagner was released with conditions. The matter dragged on through multiple hearings and entry of multiple orders including "JURY TRIAL - CANCELED OR RESCHEDULED" on December 10, 2019; a stipulated continuance on December 11, 2019; "OMNIBUS CANCELED OR RESCHEDULED" on March 18, 2020; multiple motions to withdraw and orders for new counsel; and multiple ex parte orders, until trial finally commenced on October 7, 2021. Accords (Thurston County No. 19-1-02229-34).

After the jury found Ms. Wagner guilty on October 14, 2021 of criminal impersonation and bail jumping, she continued to remain out of custody by agreement of the court and counsel. RP 279; CP 67-68. On November 15, she was sentenced to nine months of electronic home monitoring. RP 299, 302-05; CP 74-84, CP 85. She appeals. CP 89.

D. ARGUMENT

Ms. Wagner is entitled to remand and dismissal of the charge of bail jumping because an amended version of the statute applies to her case on direct appeal and the change in the law was remedial.

(1). Trial court.

Ms. Wagner was originally charged with criminal impersonation and unlawful possession of a controlled substance, per RCW 69.50.4013(1), on December 2, 2019. CP 3 (the simple drug possession law was found unconstitutional in State v. Blake, 197 Wn.2d 170, 195, 481 P.3d 521 (2021)). The charge of bail jumping pursuant to former RCW 9A.76.170(3)(c) was added by amendment of the information on February 13, 2020. CP 4.

Before trial Ms. Wagner moved to dismiss the charge of bail jumping because her failure to appear was for an unspecified hearing, not a failure to appear for trial as required for felony prosecution under RCW 9A.76.170 as later enacted. CP 9-10; see Laws 2020 ch. 19 § 1, eff. June 11,

2020; see also CP 69-70 (defense sentencing memorandum); RP 286-88 (argument at sentencing). Counsel was aware of recent Court of Appeals decisions that had rejected his arguments and argued that those appellate cases should not be followed by the trial court and/or warranted an exceptional sentence downward. CP 9-10 and n. 1; CP 69-70.

(2). Washington law, properly applied, establishes that Ms. Wagner's conviction for bail lumping must be reversed and the charge dismissed.

Under the change in the law made during Ms. Wagner's prosecution for bail jumping, the conduct supporting her conviction on that count was decriminalized. Ms. Wagner is entitled to the benefit of this remedial change in the law.

a. The Washington legislature revised the bail jumping statute in recognition of the injustice and harshness of the offense.

On March 7, 2020, the legislature amended the bail jumping statute. Laws of 2020, ch. 19, §§ 1, 2. The law took effect on June 11, 2020. Id. Under the prior law, conviction for felony bail jumping needed only to be supported by showing

that a person failed to appear "before any court of this state" without regard to the perfunctory nature of many pretrial hearings where the defendant is, and here was, ably represented by counsel. Former RCW 9A.76.170(1), (3).

Under the change in the law, felony bail jumping requires proof of a failure to appear for trial. Laws of 2020, ch. 19, § 1 (1)(a). The legislature downgraded a failure to appear for a court date other than trial to a gross misdemeanor, or no crime at all. Id. at § 2. Ms. Wagner merely failed to appear for a non-trial court hearing. Id. at § 2(1).

b. Ms. Wagner is entitled to the benefit of the change in the law as her case is on direct appeal and not final.

Ms. Wagner failed to appear for a pretrial hearing, not any part of her trial. Because her case is on direct appeal and is not final, Ms. Wagner is entitled to the benefit of the change in the law. "[S]tatutes generally apply prospectively from their effective date unless a contrary intent is indicated." State v. Jefferson, 192 Wn.2d 225, 245, 429 P.3d 467 (2018). But

another rule must also be considered in determining whether a statutory change applies to a given case: "the rule that a newly enacted statute or court rule generally applies to all cases pending on direct appeal and not yet final." Jefferson, 192 Wn.2d at 246. An amendment applies prospectively when the precipitating event for application of the statute occurs after its effective date. State v. Ramirez, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). "[A] newly enacted statute or court rule will only be applied to proceedings that occurred far earlier in the case if the triggering event to which the new enactment might apply has not yet occurred." Jefferson, 192 Wn.2d at 246.

Notably, to make this determination, a court analyzes "whether the new provision attaches new legal consequences to events completed before its enactment.'" Ramirez, 191 Wn.2d at 749. Washington courts generally hold that when the new statute concerns a post judgment matter like the sentence or revocation of release . . . then the triggering event is not a past event but a future event. In such a case, the new statute or court

rule will apply to the sentence or sentence revocation while the case is pending on direct appeal, even though the charged acts have already occurred. See Ramirez, at 749. In Ramirez, for example, the Supreme Court held the 2018 amendments addressing legal financial obligations (LFOs) applied prospectively to cases pending on direct appeal. Ramirez, at 747-49. The Court held the precipitating event for the imposition of LFOs was the termination of the defendant's case. Id. The 2018 amendments therefore applied to the imposition of LFOs in Mr. Ramirez's judgment and sentence because his case was pending on direct appeal and not final. Id.

Applying the analysis in Ramirez and Jefferson, the triggering event for imposition of Ms. Wagner's sentence is the termination of her appeal, which has not yet happened. The legislature downgraded bail jumping from a felony to a gross misdemeanor or no crime at all, impacting Ms. Wagner's judgment and sentence. The amendments apply

prospectively to her sentence "while the case is pending on direct appeal, even though the charged acts have already occurred." Jefferson, at 24. Because the change in the law applies prospectively to a triggering event that has not yet occurred (the termination of the appeal), Ms. Wagner is entitled to the benefit of the change in the law.

Several decisions have viewed Jefferson and Ramirez differently, which Ms. Wagner respectfully argues was error. This Court of Appeals in State v. Brake, 15 Wn. App.2d 740, 746-747, 476 P.3d 1094 (2020), review dismissed on other grounds, 197 Wn.2d 1016 (2021), reasoned that the decision in Ramirez did not require that the bail jumping statute be applied to all cases pending on direct appeal, and that Ramirez's holding was limited to costs imposed following conviction. State v. Brake, 191 Wn.2d at 746 ("Ramirez did not state a rule of general application[.]"); see also State v. Hoffman, 16 Wn. App.2d 563, 581–82, 481 P.3d 604, review denied, 198 Wn.2d 1018 (2021) (distinguishing Ramirez).

The particular issue of the statute, at bar in Ramirez, involved costs, and Ms. Wagner argues that the Court did not explain why this was material. Costs are part of the offender's sentence. See State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). The difference is immaterial. Under Ramirez, Ms. Wagner was entitled to the benefit of the change in the law because her case was on direct appeal and not final.

c. The change in the law applies retroactively.

The constitutional prohibition against ex post facto laws forbids the retroactive application of laws that increase punishment or create punishment where none existed before. Dorsey v. United States, 567 U.S. 260, 275, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012). Consistent with the common law, where a criminal statute is repealed or modified to the benefit of a defendant, the prior statute "is regarded as though it had never existed regarding all pending litigation." State v. Grant, 89 Wn.2d 678, 682, 575 P.2d 210 (1978).

The legislature in 1901 purported to modify this common-law rule by enacting what is often called the savings statute, RCW 10.01.040. Laws of 1901 ex. s. ch. 6 § 1.4.[1]

[1] RCW 10.01.040 provides:

> No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

Because this statute is in derogation of the common law, the Supreme Court has interpreted it narrowly and reasoned that the legislature may enact a retroactive criminal law to the benefit of the defendant if the statute "fairly convey[s] that intention." State v. Grant, 89 Wn.2d at 683; State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970).

In interpreting RCW 10.01.040, Washington courts have appeared to overlook the fundamental principle that a legislature cannot bind a future legislature from exercising its legislative power. Washington State Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 301-02, 174 P.3d 1142 (2007); United States v. Winstar Corp., 518 U.S. 839, 872-73, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996).

In interpreting the analogous federal saving statute to not impose an express intention of retroactivity, the United States Supreme Court has recognized this principle. Dorsey, 567 U.S. at 274. Therefore, a statute applies retroactively not merely when there is express intent, but also when that intent can be

inferred "by necessary implication." Dorsey, at 274. The Court reasoned this was so "because statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as Modified." Dorsey, at 274. And "no magical passwords" are required to make a statute retroactive. Dorsey, at 274 (quoting Marcello v. Bonds, 349 U.S. 302, 310, 75 S. Ct. 757, 99 L. Ed. 1107 (1955)). The legislative body remains free to express its intention of retroactivity "either expressly or by implication as it chooses." Id.

Moreover, when the legislature reduces the maximum punishment for a crime, that reduction is presumed to apply to all cases. State v. Wiley, 124 Wn.2d 679, 687, 880 P.2d 983 (1994). In such cases:

> the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one. This rule has even been applied in the face of a statutory presumption

> against retroactivity and the new penalty applied in all pending cases.

State v. Heath, 85 Wn.2d 196, 198, 532 P.2d 621 (1975). Wiley recognized this is so because "the reclassification of a crime is no mere refinement of elements, but rather a fundamental reappraisal of the value of punishment." Wiley, 124 Wn.2d at 687.

In contravention of these fundamental principles, the Brake Court of Appeals reasoned that RCW 10.01.040 created a "bright-line rule" requiring explicit language stating the change in the law is retroactive. Brake, at 746 (quoting State v. Kane, 101 Wn. App. 607, 618, 5 P.3d 741 (2000)). The Brake Court reasoned that unless there is "clear legislative intent" that a statute is retroactive, the statute must be interpreted to apply only prospectively. Brake, at 747.

This reasoning conflicts with the Court's precedents, which hold that RCW 10.01.040 must be interpreted narrowly and that the proper inquiry is simply whether the fair import of

the statute shows it was intended to apply retroactively. Grant, 89 Wn.2d at 683; Zornes, 78 Wn.2d at 13. It is also inconsistent with the United States Supreme Court's decision in Dorsey, which applied the same rule of narrow construction to the analogous federal savings statute. Dorsey, 567 U.S. at 274.

Ultimately, the proper analysis for whether a change in the law applies retroactively is one of statutory interpretation. The meaning of a statute is an issue of law reviewed *de novo*. State Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The courts use the "plain meaning" rule, which examines not only the text of the statute, but related statutes and other provisions of the same act. State Dep't of Ecology, 146 Wn.2d at 10-11. If there is ambiguity, it is appropriate to examine legislative history. State Dep't of Ecology, at 12.

The new law at issue in Ms. Wagner's case does not contain a formal statement of legislative intent. See Laws of 2020, ch. 19. The language of the statute does not make clear

whether the law was intended to have retroactive effect. The text of the law, however, impliedly indicates that retroactivity was intended. The amended offense of bail jumping and the newly created lesser offense of failure to appear or surrender, do not impose criminal liability for missing non-trial hearings. Laws of 2020, ch. 19, § 1 (1), § 2(1)(b).

This statute recognizes that it is fundamentally unfair to impose criminal liability for missing a court appearance under circumstances such as those of Ms. Wagner's case. See *Aleksandrea E. Johnson, Decriminalizing Non-Appearance in Washington State: The Problem and Solutions for Washington's Bail Jumping Statute and Court Nonappearance*, 18 Seattle J. for Soc. Just. 433, 433–34 (2020).

Given the legislature's determination of the injustice of imposing criminal liability in circumstances like Ms. Wagner's, no purpose is served by applying the old law to her case. See Heath, 85 Wn.2d at 196-98 (when legislature has effectively created a new reduced penalty for a crime, "no purpose would

be served by imposing the older, harsher one"). The fair implication or import of the law is that the Washington legislature intended to not criminalize her conduct and that this change in the law should apply retroactively, or at least to cases that are not final.

To the extent that ambiguity remains, legislative history also supports a conclusion that the law was intended to apply retroactively.

Consistent with the changes made in the law, legislative hearings show agreement that the existing scheme was too harsh and not used as originally planned, which was to deter people from intentionally evading justice, whether to improve their cases through delay or avoid prosecution entirely). See, e.g., Hearing on HB 2231 before H. Pub. Safety Comm., 66th Leg. 2020 (Jan. 14, 2020) (statements of Rep. Pellociotti, Sponsor, 41:50-46:57, 47:43-48:21) (statement of opponent Rep. Klippert, Member, 46:57-47:34) (available at https://www.tvw.org/watch/?eventID=2020011091); Hearing

on ESHB 2231 before S. Law & Just. Comm., 66th Leg. 2020 (Feb. 25, 2020) (statements of Rep. Pellociotti, Sponsor, 31:26-35:08, 39:16-40:25, 41:42-42:15) (statement of Sen. Holy, Member, 40:25-41:42) (available at https://www.tvw.org/watch/?eventID=2020021343).

A committee report summarizing public testimony in support of the law recounts how bail jumping charges were being improperly used by prosecutors, resulting in convictions that were "fundamentally unfair":

> The charge of bail jumping is utilized as a tool to get convictions rather than to promote justice. Prosecutors frequently use the charge to coerce a plea even though evidence may be insufficient for the underlying charge. In many cases these are administrative hearings that people miss. This may be the 10-12th appearance because the prosecutor keeps moving for a continuance. For indigent or near indigent clients, these hearings result in missed work, transportation costs, day care expenses, and reliance on calendaring tools or skills that these people do not have. In many cases, the defendant is not trying to abscond, but doesn't have the resources to appear at all the court dates. The Legislature should prohibit the prosecutor from using these charges inappropriately.

2019 Washington House Bill No. 2231, Washington Sixty-Sixth Legislature - 2020 Regular Session.

In this case, the State had to abandon a charge of unlawful possession of a controlled substance charge pursuant to the law found unconstitutional in State v. Blake, 197 Wn.2d 170, 195, 481 P.3d 521 (2021).

On February 13, 2020 the charge of bail jumping under former RCW 9A.76.170(3)(c) had been added. CP 4. The legislative history shows agreement by the people's representatives that imposing criminal liability, generally, in cases like Ms. Wagner's is unjust, including because some prosecutors have misemployed the law in the past in a manner that could evince unfairness.

(3). The prosecution for bail jumping contravened the law and the conviction should be reversed and the charge dismissed.

Before trial Ms. Wagner moved to dismiss the charge of bail jumping. CP 9-10. The law fairly conveys an intention to

decriminalize Mr. Wagner's conduct of missing a perfunctory non-trial hearing. And regardless, any ambiguity must be resolved in Ms. Wagner's favor. See State v. Gradt, 192 Wn. App. 230, 235-36, 366 P.3d 462 (2016) (ambiguity in law that decriminalized marijuana warranted retroactive application).

E. CONCLUSION

For these reasons, Ms. Wagner respectfully requests that this Court reverse her judgment and sentence for bail jumping and dismiss the charge.

This brief contains 3,232 words formatted in Times New Roman font 14.

Respectfully submitted this 24th day of June, 2022.

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DIVISION TWO

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	)	
Respondent,	)	
	)	NO. 56533-1-II
v.	)	
	)	
ALYSE WAGNER,	)	
	)	
Appellant.	)	

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